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No. 83-1899

# In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN J. VITALE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether evidence (to which petitioner did not object before or during trial) of petitioner's post-indictment conversation with a government informant, which was initiated by petitioner without government involvement or solicitation, was properly admitted under *Massiah* v. *United States,* 377 U.S. 201 (1964).

2. Whether the government's production of its witness list four days prior to trial, in compliance with the pre-trial order of the district court, violated petitioner's rights under *Brady* v. *Maryland,* 373 U.S. 83 (1963).

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 728 F.2d 1090.

### JURISDICTION

The judgment of the court of appeals was entered on February 29, 1984. A petition for rehearing was denied on March 27, 1984 (Pet. App. A10). The petition for a writ of certiorari was filed on May 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of conspiracy to distribute cocaine and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1)

and 846. He was sentenced to concurrent terms of ten years' imprisonment and a special parole term of ten years. The court of appeals affirmed (Pet. App. A1-A9).

The evidence at trial, which petitioner does not dispute (Pet. 5-7), is summarized in the opinion of the court of appeals (Pet. App. A2-A4). It showed that in August 1982 a confidential informant of the Drug Enforcement Administration (DEA) contacted Robert Bruner to purchase cocaine. On August 16 Bruner spoke with petitioner, who told Bruner that he had two to four ounces of cocaine. When the informant called Bruner later that evening, Bruner said he could not talk then because his "coke man" was there. DEA agents observed that an automobile registered to petitioner was parked outside Bruner's residence at the time.

Petitioner left two ounces of cocaine with Bruner that evening. Bruner later snorted some of the cocaine and discovered that it was of poor quality. He then telephoned petitioner to inform him of the problem. The next day Bruner delivered ten pounds of hashish to the informant, and the two agreed that Bruner would sell the informant one ounce of cocaine later that day. When the men met to consummate the sale, Bruner was arrested.

Upon his arrest Bruner agreed to cooperate with the government. Thereafter, he called petitioner, said he had disposed of the two ounces of cocaine, and asked if petitioner had any more. Petitioner said that he did not but that he was awaiting a delivery. On September 16, 1982, petitioner was indicted for conspiracy and distribution of cocaine.

As a result of Bruner's cooperation, Neal Spencer was arrested on September 20, 1982. Spencer, an acquaintance of petitioner's, agreed to cooperate with the DEA. In November 1982, petitioner called Spencer and, at petitioner's request, they went for a ride together in petitioner's

truck. In the course of their conversation petitioner told Spencer that he was going to beat the pending cocaine case because nobody saw him deliver the drugs and Bruner "would be the last to turn him in to the DEA." Petitioner also suggested that "the best way" to sell drugs was "on a one-to-one basis." At trial Spencer testified, without objection, about their conversation.

In his defense petitioner denied involvement in cocaine. He testified that he went to Bruner's house on August 16 to look at some submachine guns, which he refused to purchase because they were stolen. Petitioner also testified that he first met Spencer at Bruner's house and that they discussed sports. Spencer, recalled as a rebuttal witness, testified without objection that he and petitioner had discussed a marijuana deal rather than sports and that he saw a submachine gun at petitioner's house that petitioner had obtained from Bruner.

## ARGUMENT

1. Petitioner contends (Pet. 8-11) that the introduction of evidence of his post-indictment conversation with Spencer violated his Sixth Amendment right under *Massiah* v. *United States,* 377 U.S. 201 (1964). The court of appeals correctly rejected this argument.

First, as the court of appeals noted (Pet. App. A4), this question was not properly preserved in the district court.[1] Petitioner acknowledges (Pet. 9) that no objection was made at trial to the admission of Spencer's testimony, but he argues that he raised the issue in a pre-trial motion that the district court denied. However, as explained in the government's brief in the court of appeals (at 8-9), petitioner's pre-trial motion was directed to the suppression of

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[1]The court of appeals also stated (Pet. App. A5) that petitioner's claim did not amount to plain error.

certain statements made to Bruner, which the government represented it would not use at trial. Indeed, at the time the motion was filed, the government was unaware of petitioner's conversation with Spencer. Thereafter, when the government learned of their meeting and advised petitioner of its intention to introduce evidence of the conversation, defense counsel did not move to suppress Spencer's testimony or object to its admission at trial. In these circumstances, petitioner failed to preserve the *Massiah* issue for appellate review.[2]

In any event, petitioner's claim is without merit. *Massiah* holds that the government cannot introduce against a defendant "evidence of his own incriminating words, which federal agents had *deliberately elicited* from him after he had been indicted and in the absence of his counsel" (377 U.S. at 206 (emphasis added)). Under *Massiah* the "relevant * * * inquiry * * * [is] whether the Government has interfered with the right to counsel by 'deliberately eliciting' incriminating statements." *United States* v. *Henry*, 447 U.S. 264, 272 (1980). See also 447 U.S. at 276 (Powell, J., concurring) ("*Massiah* does not prohibit the introduction of spontaneous statements that are not elicted by governmental action").

The court of appeals correctly applied "*Massiah*'s 'deliberately elicted' test" (447 U.S. at 271) and concluded (Pet. App. A5) that "there is nothing in this case to suggest that the incriminating statements were 'deliberately elicted.' " Cf. *United States* v. *Franklin*, 704 F.2d 1183, 1189-1192

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[2]Because petitioner did not object either before or during trial, this case does not fall within the rule of *Lawn* v. *United States*, 355 U.S. 339, 353 (1958), that a pre-trial motion to suppress evidence preserves the claim for appeal even in the absence of an objection at trial. See *United States* v. *Contreras*, 667 F.2d 976, 978 n.1 (11th Cir.), cert. denied, 459 U.S. 849 (1982); cf. *United States* v. *Braunig*, 553 F.2d 777, 780-781 (2d Cir.), cert. denied, 431 U.S. 959 (1977).

(10th Cir. 1983); *United States* v. *Malik*, 680 F.2d 1162, 1165 (7th Cir. 1982). Thus, petitioner failed to meet his burden of demonstrating a violation of his constitutional rights. Petitioner's assertions (Pet. 9) that Spencer "deliberately elicted [the] incriminating statements," and that "[i]t was the 'intent' of the police to have [Spencer] obtain statements from [petitioner]," are unsupported by the record and were properly rejected below.[3]

2. Petitioner also contends (Pet. 11-13) that the government's production of its witness list four days before trial, in compliance with the pre-trial order of the district court, violated *Brady* v. *Maryland*, 373 U.S. 83 (1963). Petitioner claims that he was entitled to this material at an earlier (albeit unspecified) point, that such material was "favorable to [him] in that [he] could have effectively negated [the

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[3]As indicated above (see pages 2-3, *supra*), the record shows that petitioner initiated the meeting with Spencer (Tr. 93-98). However, because petitioner failed to raise the issue in the district court, the record was not developed with specific reference to the *Massiah* claim. The government represented in its brief in the court of appeals (at 8 n.1):

> The Government's evidence on this issue [that Spencer was not acting at the direction of the federal agents or attempting to elicit incriminating statements from petitioner] would have been that Spencer had agreed to work for the Government and that he was actively engaged in an investigation of his source of drugs in Indiana during this time period. However, Spencer was never instructed to meet with [petitioner], to converse with him or to attempt to elicit incriminating statements from [petitioner] by any government agent or attorney. The Government was totally unaware, until four days before trial, that Spencer had ever met with [petitioner] after [petitioner's] indictment.
>
> When the Government became aware of this information it was immediately relayed to defense counsel.
>
> Furthermore, the Government's evidence would have been that [petitioner] initiated the contacts with Spencer and that Spencer did not interrogate [petitioner] or intend to elicit incriminating statements from [petitioner].

government's] evidence at trial had he been properly and timely given such information" (Pet. II), and that he was prejudiced by the timing of the disclosure.

These contentions are wholly insubstantial. First, *Brady* applies to the "suppression * * * of evidence" by the government (373 U.S. at 87) and does not establish a constitutional right to pre-trial discovery by the defendant. See *California* v. *Trombetta*, No. 83-305 (June 11, 1984), slip op. 9 & n.8; *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977); *United States* v. *Agurs*, 427 U.S. 97, 109 (1976).[4] In addition, Brady is applicable to "evidence favorable to" the defendant (373 U.S. at 87); the government's list of witnesses does not constitute favorable evidence and hence was not required to be produced under *Brady*. See *Weatherford* v. *Bursey*, 429 U.S. at 559; *United States* v. *Alessi*, 638 F.2d 466, 481 (2d Cir. 1980); *United States* v. *Sukumolachan*, 610 F.2d 685, 688 (9th Cir. 1980); *United States* v. *John Bernard Industries, Inc.*, 589 F.2d 1353, 1357 (8th Cir. 1979).[5] Finally, petitioner has not shown prejudice from the

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[4]To the extent that the district court has discretion to order pre-trial disclosure of *Brady* material — and it is our position that the court has no such authority — the court of appeals correctly noted (Pet. App. A6-A7) that there was no abuse of discretion in this case in declining to order disclosure more than four days in advance of trial.

[5]Contrary to petitioner's argument that a witness list is favorable because it would help the defendant get ready for trial, this Court has recognized that "the impact of the undisclosed evidence on the defendant's ability to prepare for trial" is not the test under *Brady*, "since knowledge of the prosecutor's entire case would always be useful in planning the defense." *United States* v. *Agurs*, 427 U.S. at 112 n.20. See also *California* v. *Trombetta*, slip op. 9 & n.8.

Insofar as petitioner is complaining about the government's failure to make earlier disclosure of any agreements with Spencer, rather than about the witness list in general, no violation of *Brady* occurred. While such information may be favorable impeachment material under *Brady* (cf. *Giglio* v. *United States*, 405 U.S. 150 (1972)), it would not, as discussed above, have to be disclosed prior to trial. Moreover, in this case, the government represented in its court of appeals brief (at 8 n.1,

timing of the government's disclosure and did not seek any relief, such as a continuance, from the district court. Accordingly, no evidence was suppressed from petitioner, and his "right to a fair trial" under *Brady* (*United States* v. *Agurs*, 427 U.S. at 108) was not infringed. See *United States* v. *Hemmer*, 729 F.2d 10, 14 (1st Cir. 1984); *United States* v. *Higgs*, 713 F.2d 39, 44 (3d Cir. 1983); *United States* v. *Kubiak*, 704 F.2d 1545, 1549-1550 (11th Cir. 1983); *United States* v. *Xheka*, 704 F.2d 974, 981 (7th Cir. 1983), cert. denied, No. 83-338 (Nov. 28, 1983); *United States* v. *Kopituk*, 690 F.2d 1289, 1339-1340 (11th Cir. 1982), cert. denied, 461 U.S. 928 (1983); *United States* v. *Smith*, 609 F.2d 1294, 1302-1303 (9th Cir. 1979).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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18; see also Pet. App. A7 & n.2) that it was not itself aware of petitioner's conversation with Spencer until four days before trial and at that point it advised defense counsel of such evidence and of the government's agreement with Spencer concerning his testimony; in addition, Spencer testified on direct examination about his understanding with the government regarding his testimony. The government's disclosure of these matters in advance of trial occurred in full compliance with the pre-trial orders of the district court.